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No. 06-652

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IN THE

Supreme Court of the United States

BART DIDDEN, *et al.*,

Petitioners,

v.

VILLAGE OF PORT CHESTER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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INTRODUCTION

Respondents respectfully submit this Supplemental Brief to respond to new issues raised in the Amicus Curiae briefs of Law Professors D. Benjamin Barros, Eric R. Claeys, Viet D. Dinh, Steven J. Eagle, James W. Ely, Jr., Richard A. Epstein, Adam Mossof and Ilya Somin (the "Law Professors") and the Pacific Legal Foundation ("PLF") which were received after the submission of Respondents' Opposition to the Petition.

The Law Professors claim that Petitioners' suit was timely filed. However, this issue is not properly before this Court as Petitioners did not include in their Questions Presented any question relating to this ground for dismissal.[1] In reviewing the Second Circuit's decision, it is clear that the Second Circuit dismissed the entire lawsuit. Even if Amici, or Petitioners themselves, believe that the dismissal was improper, they have not asked this Court to review the correctness of the dismissal.

In any event, Petitioners' March 30, 1999 letter to the Village of Port Chester Board of Trustees demonstrates that Petitioners were fully aware that a finding of public purpose – and the concomitant authorization for the commencement of condemnation proceedings – would expose their property to condemnation. Indeed, that was the very reason that Petitioners wrote to the Village Board, urging it remove their properties from the project area.

The Law Professors' argument that Petitioners' claim was not ripe until the filing of a petition for the acquisition of real property in state court was not raised by Petitioners in the lower courts. Moreover, under New York law, condemnation proceedings begin with the holding of public hearings on whether there is a public purpose to the proposed condemnation, not the filing of a petition in state court (which only comes after the condemning authority has adopted a determination and findings). Therefore, Petitioners' right to challenge the public use determination ripened on July 14,

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1. The Law Professors, like the Petitioners, do not contest the district court's finding that this action should be dismissed on the ground of waiver. Accordingly, even if this Court were to reach the statue of limitations issue, waiver would still present a bar to the consideration of the merits of the Petition.

1999, when the Village adopted its Determination and Findings, which explains why Petitioners did not raise this claim themselves.

The Law Professors' contention that the Village's condemnation of Petitioners' properties was "pretextual" reflects their lack of familiarity with the record. This issue was not raised below, undoubtedly because Petitioners have never disputed the underlying findings by the Village that the area in question was blighted. Petitioners conceded before the district court that they had no problem with the project *per se* or with the July 14, 1999 finding of public use. Petitioners' claim was not that the project lacked a valid public purpose; rather, they sought to have their properties carved out of the project area.

PLF's claim that Petitioners "were ordered, as a condition of maintaining their property rights, to give up $800,000", Brief of Amicus Curiae PLF at 7, is baseless. Petitioners failed to timely challenge the public use determination, and consequently had no additional substantive rights other than to receive just compensation from the Village pursuant to Articles 3, 4, and 5 of the EDPL. Nor can it be said that the settlement offer, made by the private developer, constituted an "order" since Petitioners were not coerced into doing anything and had the right to refuse the offer and retain all of their "rights".[2]

I. Because This Action Was Dismissed As Time-barred And As Waived, And Petitioners Have Not Sought Review Of Those Grounds For Dismissal, This Court Should Not Consider Amici's Constitutional Arguments

A. Petitioners Knew Their Properties Could Be Condemned.

According to the Law Professors, "the Petitioners at [the time the Village entered its Determination and Findings] had no inkling of Greg Wasser's extortionate demands, which were only made four years later, in November 2003." Brief of Amicus Curiae Law Professors, at 15. The Law Professors posit that

2. Respondents respectfully refer the Court to their Opposition to Petition wherein Respondents present the Questions Presented, Jurisdictional Statement, and Statement of the Case.

the Second Circuit's holding "credits the Petitioners' with the clairvoyance to know in 1999 that Gregg Wasser would make crude efforts at extortion some four years later in 2003." *Id.* at 14. The Law Professors contend that Petitioners' suit was timely-filed because it was filed two months after a "concrete threat of condemnation." These contentions are without any factual or legal support.

The district court dismissed all of Petitioners' claims as time-barred and as having been waived (Pet. App. at 9-10, 12-13), and the Second Circuit affirmed the judgment of dismissal. Petitioners did not include in their Questions Presented any question relating to these grounds for dismissal (*Id.* at 1) and have not made any argument that the dismissal of their case on these grounds was erroneous, much less that such dismissal presents issues worthy of review by this Court. In reviewing the Second Circuit's decision, it is clear that the Second Circuit dismissed the entire lawsuit. *See Didden v. Village of Port Chester*, 173 Fed.Appx. 931, 932-33 (2d Cir. 2006). Even if Amici, or Petitioners themselves, believe that the dismissal was improper, they have not asked this Court to review the correctness of the dismissal. Since this Court will not consider any questions not set out in the petition (Sup. Ct. R. 14), this action will stand dismissed, no matter the resolution of the questions that Petitioners do propound. Therefore, "the court cannot look into the cause of action". *Mc'Cluny v. Silliman*, 28 U.S. 270, 278 (1830); *see also* Opposition to Petition, at 11. Again, no case or controversy exists, and thus this Court lacks subject matter jurisdiction to hear Petitioners' claims. *Paschall v. Christie-Stewart, Inc.* 414 U.S. 100, 102 (1973); *Powell v. McCormack*, 395 U.S. 486, 496-97 (1969); *Rescue Army v. Mun. Ct. of City of Los Angeles*, 331 U.S. 549, 569 (1947).

In any event, as the district court correctly found, Petitioners' March 30, 1999 letter to the Village of Port Chester Board of Trustees demonstrated that Petitioners were fully aware that a finding of a public purpose would expose them to the prospect of condemnation. *See Didden v. Village of Port Chester*, 304 F.Supp.2d 548, 558-59, 566 (S.D.N.Y. 2004) ("*Didden I*"). Petitioners did not challenge the July 14, 1999 Determination and Findings; rather, they attempted to persuade the Village to carve out from the project areas those

properties that were inside the area. That Petitioners pursued that approach reflects their knowledge that their properties would be subject to condemnation if the Village did not change the project boundaries and adopt the findings.

To avoid this fact, the Law Professors attempt to separate the public use determination from the filing of a petition in state court, as if they were separate events. This is to no avail, because the public use determination and the filing of a condemnation petition are part of the same condemnation proceeding: "The EDPL sets forth a staged process for addressing the various issues that arise during a condemnation-each stage being the subject of its own section (article) of the EDPL. However . . . the five stages of [the] EDPL constitute a single, unitary proceeding." *Didden I*, 304 F.Supp. at 564 (citing *Broadway 41st Street Realty Corp. v. New York State Urban Dev. Corp.*, 733 F.Supp. 735, 743 (S.D.N.Y. 1990)).[3] Thus, contrary to what the Law Professors suggest, the condemnation proceeding began in 1999, not 2003, and Petitioners knew at that time that their properties could be subject to condemnation. *See Didden I*, 304 F.Supp. at 566 ("In their March 1999 Letter, Plaintiffs evidenced full awareness of what was going on in terms of the Redevelopment Project and the LADA. They even acknowledged that their properties were subject to condemnation."); *Didden v. Village of Port Chester*, 322 F. Supp.2d 385, 389 (S.D.N.Y. 2004) ("*Didden II*").

3. The Article 2 stage conclusively determines the need and location of a public project. *See* EDPL Art. 2. This stage includes two sub-stages. First, Article 2 requires the condemnor to conduct the public hearing upon public notice. EDPL §§ 202-203. Following the public hearing, the condemnor adopts a determination and findings which are published. EDPL § 204. Second, aggrieved persons may then seek judicial review in the Appellate Division by filing a petition within thirty (30) days after the completion and publication of the determination and finding. EDPL § 207. The Article 3 stage involves the making of compensation offers for property that has been forced to be subject to condemnation for a public purpose. *See* EDPL Art. 3. The Article 4 stage involves the condemnor's commencement of proceedings to acquire the necessary property and effects a taking of the property under Article 4. *See* EDPL Art. 4. The Article 5 stage concerns the issue of just compensation which includes the filing of claims by condemnees for damages, the filing of appraisals and proffering of expert testimony by the parties, and a decision by the court fixing monetary relief based upon the evidence heard. *See* EDPL Art. 5.

B. Petitioners Did Not Assert A Ripeness Claim

The Law Professors' suggest that Petitioners' right to challenge the public use determination did not ripen until the filing of a petition in state court. Relying upon *Daniels v. Area Plan Comm'n*, 306 F.3d 445, 454 (7th Cir. 2002) and *Palazzolo v. R.I.*, 533 U.S. 606, 618 (2001) both inverse condemnation cases (and more specifically, regulatory takings cases), the Law Professors state that "if the Petitioners had tried to file a suit to block the Village's actions before November 2003, it might have been dismissed for lack of ripeness." Brief of Amicus Curiae Law Professors, at 16. The Court should not address this argument because it was not raised by the Petitioners in their Petition or below. *See Franchise Tax Bd. Of Cal. V. Hyatt*, 538 U.S. 488, 497 (2003) (declining amicus curiae's invitation to reexamine a prior ruling of the Court when the petitioner did not address that issue in the petition); *United Parcel Serv. v. Mitchell*, 451 U.S. 56, 60 n. 2 (1981) (noting that this Court does not decide issues raised by amicus curiae that were not decided by the Court of Appeals or argued by the interested party).

Moreover, in raising their theory, the Law Professors conflate the law concerning direct condemnations with inverse condemnations. "[D]irect condemnation, by invocation of the State's power of eminent domain, presents different considerations from cases alleging a taking based on a burdensome regulation." *Palazzolo*, 533 U.S. at 628; *see U.S. v. Clarke*, 445 U.S. 253, 257 (1980) (discussing the "important practical differences" between direct and inverse condemnation proceedings); *U.S. v. Dow*, 357 U.S. 17, 20 (1958) (same). One such consideration is the issue of public use, which is a practical consideration. *See, e.g., Berman v. Parker*, 348 U.S. 26, 34-36 (1954); *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 2663 (2005). Conversely, the issue of public use is not relevant to a regulatory takings case. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002) (After this Court's decision in *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922), "neither a physical appropriation nor a public use has ever been a necessary component of a 'regulatory taking.'"). Put simply, the application of regulatory

takings precedents (including decisions analyzing ripeness of claims) to direct condemnation cases has no basis in law and should not be countenanced by the Court. *See Tahoe-Sierra Preserv. Council*, 535 U.S. at 323 ("This longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.") (internal footnote omitted).[4]

II. Amici's "Pretectual Takings" Argument Was Not Pled By Petitioners And Should Not Be Heard By This Court.

Despite the Village's findings of a public use to eliminate urban blight, which is amply supported by the record and never disputed by Petitioners, the Law Professors claim that the finding was a "pretext" for condemning Petitioners' properties. *See* Brief of Amicus Curiae Law Professors, at 5. While the Law Professors seek to have this Court consider their "pretextual takings" claim, Petitioners did not raise a "pretextual takings" claim in their Amended Complaint. *See* Am. Comp., at 20-25. Consequently, the Court should not address this argument. *See Palazzolo*, 533 U.S. at 631-32; *Glover v. U.S.*, 531 U.S. 198, 204 (2001); *cf. United Parcel Serv., Inc, supra*, 451 U.S. at 60 n. 2.

Petitioners did not raise this theory because Petitioners, who were fully familiar with events in Port Chester, knew the facts would not support it. As reflected in *Didden I*, the July 1999 Determination and Findings formed the predicate for the acquisition of thirty-eight separate properties. *See Didden I*, 304 F.Supp.2d at 552. To suggest that the Determination was a "pretext" for the taking of some of Petitioners' properties would necessarily require that Petitioners assert that the taking of the other thirty-seven properties was part of the same

4. The differences between physical appropriations and regulatory takings do not end there. In either a direct condemnation or physical takings case, the fact and extent of the appropriation is known. *Palazzolo*, 533 U.S. at 628. In a regulatory takings case, however, the fact and extent of the taking are not known until a court knows "the extent of permitted development" on the land in question. *Id.* (citing *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986)).

"pretext". It would be absurd to contend that the findings were simply a "pretext" to get at one particular set of landowners, while not pretextual as to the other thirty-seven landowners. Moreover, the Law Professors ignore the fact that Petitioners conceded before the district court that they had no problem with the project *per se* or with the July 14, 1999 finding of public use. *Didden I*, 304 F.Supp. at 566-67. Indeed, Petitioners did not argue that the taking of property to effectuate the Project served no valid public purpose, only the taking of *their* properties served no valid public purpose. *Id.* at 559, 566-67. The Law Professors further ignore the fact that Petitioners had not suggested "that the proceeding was commenced in bad faith at that time . . . nor does the record support such a finding." *Id.* at 568.

The Law Professors' bald assertion that the taking was "pretextual" is unsupported by the record. The Redevelopment Project serves a clear public purpose – the redevelopment of the blighted downtown area of Port Chester. *See Didden I*, 304 F.Supp.2d at 559-60; *accord Brody v. Village of Port* Chester, 261 F.3d 288, 290-91 (2d Cir. 2001). Petitioners have never argued that Port Chester was not blighted. Moreover, the Petitioners acknowledged, in their March 1999 letter, that their CVS proposal did not fully satisfy the Village Board of Trustees. *Didden I*, 304 F.Supp.2d at 554, 560 n. 3. G&S's proposal included lot 11, a vacant lot adjoining Petitioners' property that otherwise would have been impossible to develop under Petitioners' plan. As the district court correctly found, Petitioners' plan would not have effectuated the Village's redevelopment plans because that lot would have remained undeveloped and isolated from any future development possibility. *Id.* at 555. Petitioners and Amici have failed to adduce any evidence that the taking of Petitioners' properties was not rationally related to the purpose of removing blighted, urban areas.

The Law Professors' reliance upon *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F.Supp.2d 1123 (C.D. Cal. 2001); *Aaron v. Target Corp.*, 269 F.Supp.2d 1162 (E.D. Mo. 2003), *rev.'d*, 357 F.3d 768 (8th Cir. 2004), and *Cottonwood Christian Ctr. v.*

Cypress Redev. Agency, 218 F.Supp.2d 1203 (C.D. Cal. 2002), as support for their "pretextual taking" argument, is misplaced as each case is readily distinguishable. In *Armendariz*, 75 F.3d at 1313, the City of San Bernardino conducted a series of housing code enforcement sweeps against the plaintiffs' properties which failed to not ˙y them in advance that the sweeps would take place, failed to inform them at the time of the closures why their building were being closed down, and did not identify the specific code violations until well after the sweeps had been completed and the buildings closed. In *99 Cents Only Stores*, 237 F.Supp.2d at 1129-30, the City of Lancaster admitted that (1) the *only* reason it sought to condemn the subject property was to satisfy the expansion demands of Costco and (2) it was willing to go to any lengths, even so far as condemning commercially viable, non-blighted real property, simply to keep Costco within the City's boundaries. *Aaron* involved a situation where the private entity (Target) surreptitiously manipulated a locality's eminent domain procedure from its inception solely to take ownership in the building it was leasing for the purpose of building a new Target store on the site. 269 F.Supp.2d at 1165. In addition, Target authored a blight study, or at least the critical part of it finding that the properties were blighted or unsanitary, and "beefed up" the study with the assistance of the City. In *Cottonwood Christian Ctr.*, 218 F.Supp.2d at 1228-29, the court held that sufficient circumstantial evidence of a discriminatory intent existed behind City of Cypress' denial of a conditional use permit and subsequent condemnation of the plaintiff church's property. The court also held that the stated purposes for the City's refusal to grant a conditional use permit and condemnation of the church's property – blight and generating revenue – was not "sufficiently compelling to justify burdening Cottonwood's religious exercise." *Id.* at 1228. Conversely, in the present case Petitioners did not object to the public use determination and failed to adduce any evidence that the taking of their properties "was not rationally related to the purpose of the overall Redevelopment Project." *Didden I*, 304 F.Supp.2d at 559-60.

The Law Professors warn that if the Second Circuit's decision is not overruled, "private developers will be handed a blueprint on how to take private property for their own benefit, irrespective of any public interest." Brief of Amicus Curiae Law Professors, at 12. There is no merit to this argument because the Second Circuit's decision was unpublished, and thus cannot be cited in unrelated cases before the Second Circuit or any other court. (Second Circuit Local Rule 0.23).

Even assuming the Law Professors are correct, they still fail to provide a basis for the Court to accept the Petition. Indeed, "the importance of an issue should not distort the principles that control the exercise of [the Court's] jurisdiction. To the contrary, 'by adhering scrupulously to the customary limitations on our discretion regardless of the significance of the underlying issue, we promote respect . . . for the Court's adjudicatory process.'" *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (quoting *Adams v. Robertson*, 520 U.S. 83, 92, n. 6 (1997) (per curiam).

III. Property Rights Are Held Subject To The Sovereign's Eminent Domain Power.

PLF maintains that Petitioners "were ordered, as a condition of maintaining their property rights, to give up $800,000." Brief of Amicus Curiae PLF, at 7. PLF's argument lacks merit.

First, as detailed in Respondents' Opposition to Petition, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), do not present any compelling reason for granting the writ. *See* Opposition to Petition, at 24-26. Second, although it is unclear to what "property rights" PLF refers, PLF's brief implies that Petitioners have a right to possess some of their properties free from the exercise of condemnation, despite the prior, unchallenged finding of a public purpose for the use of eminent domain with respect to some of their properties. Since the Village in July 1999 adopted the Determination and Findings, and Petitioners did not avail themselves of the procedures offered by New York law to challenge the Determination and Findings, Petitioners' properties were subject to the invocation of eminent domain to fulfill the established

public purpose. "There is no absolute constitutional right not to have one's property condemned." *Langley Land Co. v. Monroe County*, 738 F.Supp. 1580, 1583 (M.D. Ga. 1990). In addition, it is well-established that all private property rights are held subject to the sovereign's exercise of the eminent domain power. *See Adirondack Ry. Co. v. New York*, 176 U.S. 335, 346 (1900); *State of Georgia v. City of Chattanooga*, 264 U.S. 472, 481 (1924); *U.S. v. Carmack*, 329 U.S. 230, 236-37 (1946). The eminent domain power is limited by the requirement that the taking is for a public use and that the condemnee is paid just compensation. *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 231-32 (2003); *U.S. v. Jones*, 109 U.S. 513, 519 (1883); *Mississippi & Rum River Boom Co. v. Patterson*, 98 U.S. 403, 406 (1878).

In the present case, Petitioners did not timely object to the public use determination and conceded that their properties were appropriately placed in the condemnation zone. *Didden II*, 322 F.Supp.2d at 389. Consequently, Petitioners "have no additional substantive rights other than to receive just compensation from Port Chester pursuant to Articles 3, 4, and 5 of the EDPL." *Id.*; *see U.S. v. Agee*, 322 F.2d 139, 143 (6th Cir. 1963) ("Where the taking is for a public purpose, the rights of the property owner are satisfied when he receives that just compensation which the Fifth Amendment requires as the price of the taking."); *cf. U.S. v. 3,065.94 Acres of Land*, 187 F.Supp. 728, 729 (S.D. Cal. 1960) ("There are only three issues raised by the filing of a complaint in condemnation, viz.: (1) the right to take, i.e., 'public use;' (2) 'just compensation;' and (3) to whom the just compensation should be paid.").

Further, there is no basis for PLF's argument that Petitioners' were "ordered" to do anything. The making of a settlement offer by a developer, which Petitioners were free to reject, cannot be twisted in to a municipal edict with which Petitioners were required to comply. Petitioners declined the offer and did not relinquish any "rights".

CONCLUSION

Amici Curiae have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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